

1 GLYNN & FINLEY, LLP  
 CLEMENT L. GLYNN, Bar No. 57117  
 2 ADAM FRIEDENBERG, Bar No. 205778  
 One Walnut Creek Center  
 3 100 Pringle Avenue, Suite 500  
 Walnut Creek, CA 94596  
 4 Telephone: (925) 210-2800  
 Facsimile: (925) 945-1975  
 5 Email: [cglynn@glynnfinley.com](mailto:cglynn@glynnfinley.com)  
[afriedenberg@glynnfinley.com](mailto:afriedenberg@glynnfinley.com)  
 6  
 Attorneys for Defendant and Counter-Plaintiff  
 7 ConocoPhillips Company  
 8

9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA

11 HOUTAN PETROLEUM, INC.	)	Case No. 3:07-cv-5627 SC
12 Plaintiff,	)	
13 vs.	)	<b><u>CONOCOPHILLIPS COMPANY'S</u></b>
	)	<b><u>MOTION IN LIMINE NO. 3</u></b>
14 CONOCOPHILLIPS COMPANY, a Texas	)	<b><u>RE: EXCLUSION OF EVIDENCE OF</u></b>
15 corporation and DOES 1 through 10,	)	<b><u>LOST PROFITS, CONSEQUENTIAL</u></b>
Inclusive	)	<b><u>DAMAGES OR OTHER ALLEGED</u></b>
	)	<b><u>ACTUAL DAMAGES</u></b>
16 Defendants.	)	
17 _____	)	<b>Pretrial Conference: February 6, 2008</b>
	)	<b>Time: 10:00 a.m.</b>
	)	<b>Courtroom: 1</b>
	)	<b>Before: Hon. Samuel Conti</b>
	)	<b>Trial Date: February 11, 2008</b>

20 Defendant and Counter-Plaintiff ConocoPhillips Company ("ConocoPhillips") hereby  
 21 moves in limine for an order excluding evidence of lost profits, consequential damages or other  
 22 actual damages.

23 **I. INTRODUCTION**

24 The gravamen of the Complaint is Plaintiff's contention that ConocoPhillips's offer to  
 25 sell its equipment and improvements to Houtan Petroleum was not "bona fide" under the PMPA.  
 26 Plaintiff seeks equitable relief to compel ConocoPhillips to make a new offer. (Compl. ¶¶ 42,  
 27 47(4).) As the Court recognized in denying Plaintiff's application for preliminary injunctive  
 28 relief, this equitable claim is the only issue truly in dispute for trial. (Docket No. 18 at 14:13-15.)

1 Although the Complaint includes a conclusory allegation that Houtan Petroleum “has, and will  
2 continue to suffer damages . . . as a proximate result of” ConocoPhillips’ alleged PMPA  
3 violation (Compl., ¶¶ 41, 47), Plaintiff does not, because it cannot, allege any facts to support the  
4 claim. Moreover, the Court has already found that the termination was proper (Docket No. 18 at  
5 10:1-12:18), and thus Plaintiff could not establish any recoverable damages caused by the  
6 termination.

7 Further, although the Court denied Houtan Petroleum’s application for injunctive relief  
8 (to maintain possession of ConocoPhillips’ equipment and improvements pending the litigation),  
9 Houtan Petroleum has refused to return this property to ConocoPhillips. Instead, it remains in  
10 exclusive possession of ConocoPhillips’ property, which it continues to use to operate the  
11 Station, without paying any rent to ConocoPhillips. It has never ceased operations. Thus Houtan  
12 Petroleum has effectively obtained the preliminary injunction this Court denied. As a matter of  
13 law, therefore, Houtan Petroleum cannot establish any recoverable damages resulting from the  
14 franchise termination.

## 15 **II. ARGUMENT**

16 Although the PMPA permits recovery of damages caused by an improper franchise  
17 termination, the Court here has already found that Plaintiff cannot establish an improper  
18 termination. ConocoPhillips provided timely notice in the franchise agreement itself that the  
19 agreement would terminate when ConocoPhillips’ underlying property lease expired (a proper  
20 ground for termination under the PMPA). (Docket No. 18 at 11:2-13; 15 U.S.C. § 2802(c)(4).)  
21 As the termination was proper, it is axiomatic that Plaintiff could not demonstrate any resulting  
22 damages resulting therefrom.

23 Moreover, where a franchisee asserts a claim under the PMPA to challenge a franchise  
24 termination, but remains in possession of the station property pending litigation, the franchisee as  
25 a matter of law cannot establish any damages resulting from the termination. *See, e.g., Chevron*  
26 *U.S.A., Inc. v. El-Khoury*, 202 WL 31256160, \*2 (C.D. Cal. 2002); *Blankenship v. Knox Oil Co.*,  
27 548 F. Supp. 789 (E.D. Tenn. 1982) (“Plaintiff has had possession of the premises and has  
28 continued to operate the service station. He has, therefore, suffered no damages”); *see also Clark*

1 *v. Mobil Oil Corp.*, 496 F. Supp. 132, 136 (E.D.Mo. 1980) (“inasmuch as plaintiff has continued  
 2 to operate the filling station [pending resolution of PMPA litigation challenging nonrenewal] he  
 3 has sustained no actual damages other than nominal”); *Noe v. Mobil Oil Corp.*, 503 F. Supp. 213,  
 4 216 (E.D.Mo. 1980) (notwithstanding trial verdict resulting in imposition of injunction to prevent  
 5 franchise termination, franchisee was denied monetary damages where “there was no evidence  
 6 that plaintiff suffered any actual damages from defendant’s attempt to terminate”). Such is the  
 7 case here. Plaintiff has maintained station operations throughout the litigation, retaining and  
 8 using -- but without paying any rent for -- ConocoPhillips’ pumps, storage tanks, buildings and  
 9 other property. In reality, the franchise termination has, thus far, resulted in a substantial  
 10 windfall, not any compensable monetary loss, to Plaintiff.

11 The termination has affected station operations in two ways: 1) Houtan Petroleum may  
 12 no longer use ConocoPhillips’ trademarks and trade dress; and 2) ConocoPhillips no longer  
 13 supplies gasoline to the station (which instead purchases gasoline from other sources). Under the  
 14 Franchise Agreement, however, Plaintiff had no reasonable expectation that it would continue to  
 15 use ConocoPhillips’ trademarks or receive fuel supply from ConocoPhillips after October 31,  
 16 2007. The plain language of the agreement made clear that it would terminate, and with it  
 17 Plaintiff’s right to use ConocoPhillips’ intellectual property, upon expiration of ConocoPhillips’  
 18 underlying property lease. (Docket No. 5, Ex. A at ¶¶ 2(a), 10(d), Addendum 1.) Moreover, it  
 19 was Houtan Petroleum’s agreement to lease the property directly from the property owner (V.O.  
 20 Limited), and not any act by ConocoPhillips, that necessitated termination. Plaintiff thus cannot  
 21 show “termination or non-renewal of the franchise on terms other than those permitted” (*El-*  
 22 *Khoury*, 2002 WL 31256160 at \*2), much less any resulting injury.

23 ///

24 ///

25 ///

26 ///

27 ///

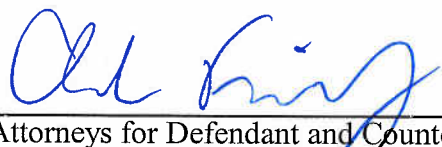
28 ///

1 **III. CONCLUSION**

2 For the foregoing reasons, ConocoPhillips respectfully requests that the Court enter an  
3 order excluding any evidence or claim of lost profits, consequential damages or other actual  
4 damages resulting from ConocoPhillips' termination of the parties' franchise agreement.

5  
6 Dated: January 29, 2008

7 GLYNN & FINLEY, LLP  
8 CLEMENT L. GLYNN  
9 ADAM FRIEDENBERG  
One Walnut Creek Center  
100 Pringle Avenue, Suite 500  
Walnut Creek, CA 94596

11 By   
12 Attorneys for Defendant and Counter-  
13 Plaintiff ConocoPhillips Company  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28